Supreme Court, U.S.
FILED

'98 942 DEC 9 - 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can flaunt the Due Process Clause of the Fourteenth Amendment and evade federal habeas corpus relief for an incontestably innocent prisoner by claiming that an appellate decision constitutes "new law," when in fact the state did not and could not prove a key element of the crime at trial?

2. Whether the Equal Protection Clause of the Fourteenth Amendment permits a state to reverse one conviction and uphold another conviction when the two co-defendants were charged with violating the same statutory provisions; they were simultaneously tried together before the same jury; and they were convicted on the same factual record?

3. Whether federal habeas relief should be extended to protect federal constitutional rights when a state refuses to retroactively apply a case which based its decision on the already existing clear language of the statute?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were as follows:

Appellants: Gregory White, *Warden of the State Correctional Institution at Pittsburgh*

The Attorney General of the Commonwealth of Pennsylvania

Appellee: William Fiore

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CITATIONS TO OPINIONS

The July 21, 1998 Judgment and Opinion of the United States Court of Appeals for the Third Circuit, which appear in the Appendix, is reported at 149 F.3d 221 (1998) (No. 97-3288) (App. B and App. A, respectively). No other federal court orders related to the petition for writ of habeas corpus are reported. The petition for rehearing of the July 21, 1998 decision was denied on September 23, 1998 (App. C). The July 21, 1998 Judgment and Opinion reversed the April 24, 1997 Memorandum Order, which adopted the February 27, 1997 Magistrate Judge's Report and Recommendation of the United States Court of Appeals for the Western District of Pennsylvania (No. 96-1231). The District Court's Order and the Magistrate Judge's Report also appear in the Appendix (App. D and App. E, respectively).

Petitioner's April 10, 1987 Judgment of Sentence in the Court of Common Pleas, Criminal Division, Allegheny County, Pennsylvania is recorded at No. CC 8508740. It is unreported. The Superior Court of Pennsylvania's May 12, 1989 Memorandum Opinion affirming his judgment of sentence is unreported (No. 485 Pittsburgh 1988). The *per curiam* affirmance is reported at 563 A.2d 189 (Pa.Super. 1989). Petitioner Fiore's petition to the Pennsylvania Supreme Court for allowance of appeal was denied on March 13, 1990 at 575 A.2d 109 (Pa. 1990).

David Scarpone, co-defendant of Petitioner Fiore, was tried before the same court and the same jury as Petitioner Fiore. Scarpone's convictions also are recorded

at No. CC8508740. The August 5, 1991, reversal of Scarpone's conviction is published at *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991). On March 25, 1992, the Pennsylvania Supreme Court, in an unpublished order (without an opinion), denied Petitioner Fiore's application for extraordinary relief (No. 9 W.D. Misc. Dkt. 1992) to take jurisdiction over his case and consolidate it with the appeal of *Commonwealth v. Scarpone* to the Pennsylvania Supreme Court. The December 15, 1993 Pennsylvania Supreme Court Opinion affirming the Commonwealth Court's decision is reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). The March 22, 1994 Order of the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) denying Petitioner Fiore's second emergency application is also unreported.

The August 18, 1994 Findings of Fact and Conclusions of Law and Order of Court from the Allegheny County Court of Common Pleas at No. CC8508740 denying Petitioner Fiore's petition for post-conviction relief is unpublished. The Pennsylvania Superior Court's September 20, 1995 opinion affirming the trial court's August 18, 1994 Order is reported at 665 A.2d 1185 (Pa. Super. 1995). The Pennsylvania Supreme Court's April 19, 1996 denial of Petitioner Fiore's petition for allowance of appeal is reported at 675 A.2d 1243 (Pa. 1996).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On July 21, 1998 the Court of Appeals reversed a District Court order granting a petition for writ of habeas corpus (App. A – App. B and App. D – App. E). Petitioner timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. The petition was denied by the Court of Appeals on September 23, 1998 (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

From the time of his conviction to today, Petitioner Fiore has been denied due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that he stands convicted of a crime based on evidence which indisputably does not support each essential element of the crime.

1. *United States Constitution, Amendment XIV, § 1*:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Habeas Corpus, 28 U.S.C. § 2254(a), as amended April 24, 1996*:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

3. *Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.401(a)*:

"(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

4. *Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.606(f)*:

"(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both."

5. *Rules of Strict and Liberal Construction, 1 Pa. C.S.A. § 1928(b)(1)*:

" . . . (b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed:

(1) Penal provisions."

CONCISE STATEMENT OF THE CASE

The relevant facts presented are not in dispute. Petitioner, William Fiore, owned and operated a hazardous waste facility in western Pennsylvania under permit from the State's Department of Environmental Resources ("DER").[1] (App. A-3). The DER did not dispute that Fiore had obtained a permit for this facility. Fiore and the facility's general manager, David Scarpone, were charged with various criminal counts, including the "operation of

[1] Recently, the agency's name was changed to the Pennsylvania Department of Environmental Protection.

a hazardous waste disposal facility *without a permit"* in violation of Pennsylvania's Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony. (App. A-3 and App. E-2 – E-4).

The essence of this felony charge against Petitioner and Mr. Scarpone was that they criminally operated a hazardous waste facility "without a permit." (App. E-3 – E-4).[2]

It is undisputed that Petitioner Fiore and his employee Scarpone *had* a DER permit to operate the facility. The Commonwealth argued that because they operated the facility contrary to the parameters of the DER permit, the permit became "null" and, effectively, nonexistent. (App. A-3).

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revoke or suspend that permit, or must it be worded so in the permit?"

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's question was "no," because under the SWMA regulations no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to Pennsylvania's Environmental Hearing Board. The Court

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[2] *See also, Commonwealth v. Scarpone,* 634 A.2d 1109, 1112 (Pa. 1993).

instructed the jury that if Petitioner's conduct was sufficiently egregious and outside the parameters of the permit, the permit was effectively revoked.

Thereafter, the jury returned with a verdict of guilty as to both Petitioner and Mr. Scarpone. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion, the Superior Court transferred the appeals to the Commonwealth Court of Pennsylvania.[3] On Petitioner's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but it retained co-defendant David Scarpone's appeal. (App. E-5).

Petitioner's appeal to the Pennsylvania Superior Court resulted in an affirmance of the conviction. The Pennsylvania Supreme Court denied Fiore's petition for allowance of appeal. *Commonwealth v. Fiore,* 563 A.2d 189 (Pa. Super. 1989), *alloc. denied,* 575 A.2d 1185 (Pa. 1990); (see also App. E-5 – E-6).

Mr. Scarpone's appeal was decided by the Pennsylvania Commonwealth Court at *Scarpone v. Commonwealth,* 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone,* 634 A.2d 1109 (Pa. 1993). The Commonwealth Court held that since Petitioner had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit*. Mr. Scarpone's conviction was reversed. *Id.;* (App. E-7).

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[3] The Commonwealth Court and the Superior Court are intermediate appellate courts in Pennsylvania. (*See* App. E-5 n.2 and E-11).

The Pennsylvania Supreme Court granted the Commonwealth's petition to review *Scarpone*. (App. E-7). Meanwhile, Petitioner Fiore petitioned the Pennsylvania Supreme Court by emergency application (No. 9 W.D. Misc. Dkt. 1992) to reconsider his conviction in conjunction with its review of *Scarpone*. The Pennsylvania Supreme Court denied the emergency application. (App. E-7).

The Pennsylvania Supreme Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court's reversal of Scarpone's conviction, the Pennsylvania Supreme Court held:

> **We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit** against Mr. Scarpone under the statute. Simply put Mr. Scarpone **did have a permit**.

Commonwealth v. Scarpone, 634 A.2d 1109, 1112 (Pa. 1993) (emphasis added). The Pennsylvania Supreme Court concluded:

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility **without a permit** is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 P.S. § 1928(b)(1).

Scarpone, 634 A.2d at 1112 (emphasis in original). Refusing to condone the "bald fiction," the Pennsylvania

Supreme Court affirmed the Commonwealth Court's reversal of Scarpone's conviction.

Thereafter Petitioner filed another emergency application with the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) requesting the Court to reverse the blatant inequity of his conviction. The application was denied. (App. E-8).

Petitioner then filed a motion for post-conviction collateral relief with the trial court. (App. E-8). The trial court denied the motion and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995), *alloc. denied* 675 A.2d 1243 (Pa. 1996).

On July 3, 1996, Petitioner Fiore filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania (No. 96-1231). Petitioner Fiore's petition raised the following two issues:

1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.

2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(App. E-9 – E-10). In a report issued on February 27, 1997, United States Magistrate Judge Francis X. Caiazza recommended that the writ of habeas corpus be granted. (App. E-1). On April 21, 1997 United States District Court Judge Gary L. Lancaster adopted the Magistrate's Report and Recommendation and ordered that the petition for writ of habeas corpus be granted. (App. D-1 – D-2). The District

Court further ordered that Petitioner Fiore be released from the part of his incarceration that pertains to his convictions under 35 P.S. §§ 6018.401(a) and 6108.606(f). (App. D-2). The District Court's decision was based, in part, on the fact that Fiore's conviction was affirmed while his co-defendant's conviction was reversed on the same factual issue — whether a permit existed. (App. E-12, E-17 - E-18).

On July 21, 1998 the United States Court of Appeals for the Third Circuit reversed the District Court. (App. A and App. B). A petition for rehearing was denied. (App. C).

Petitioner Fiore is presently incarcerated in the State Correctional Institute at Pittsburgh, Pennsylvania for committing acts which the Pennsylvania Supreme Court, under identical facts and identical statutory provisions, has held were never criminal under the penal provisions charged.

REASONS WHY THE WRIT SHOULD BE GRANTED

An Indisputably Innocent Man Remains Incarcerated For A Crime The Commonwealth Effectively Concedes It Could Not Prove. This Writ Should Be Granted To Correct The Continuing Miscarriage Of Justice That Occurred When The Court Of Appeals Reversed The District Court's Grant Of Federal Habeas Relief.

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a).

Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts that never constituted a crime under the section of the Pennsylvania Crimes Code.

A. DUE PROCESS - INSUFFICIENCY OF THE EVIDENCE

This Court should exercise its supervisory powers and grant this Petition because a man has been stripped of his constitutional rights. The due process clause of the federal Constitution requires the Commonwealth to prove each element of the offense charged, including the lack of a DER permit, beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993). Petitioner Fiore cannot be punished by a trial court when the Commonwealth could not prove that a DER permit did not exist. Simply put, if the government admits that Petitioner Fiore had a DER permit for the facility in question, it cannot convict him of a crime in which one of the key elements is the lack of a DER permit.

The Court of Appeals erred in framing its analysis of Petitioner's due process claim as simply a request that Petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). (App. A-2). Rather, Petitioner's due process claim is a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not

establish each essential element of the crime upon which he is convicted. This Court's precedent holds that Petitioner Fiore cannot remain convicted of a crime, in violation of his constitutional guarantees, if the trial court has no authority to punish him in the first place. This fundamental principle of the American criminal justice system remains true despite technical procedural rules such as the putative nonretroactivity. *See United States v. Johnson*, 457 U.S. 537, 550 (1982), citing *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) and *Robinson v. Neil*, 409 U.S. 505, 509 (1975).

In order to convict a defendant the Due Process Clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of **every** fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970) (emphasis added).

Following *Winship*, this Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In reviewing challenges to the sufficiency of the evidence, the question for habeas corpus is not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983), quoting *Jackson v. Virginia*, 443 U.S. at 319; *Paullet v. Howard*, 634 F.2d 117 (3d Cir. 1980). This case meets this burden.

The statutory section under which Petitioner was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . **unless such person . . . has first obtained a permit for the storage,** treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a) (emphasis added). The pivotal element of this crime is the lack of a permit. The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times. (App. A-3 and App. E-2 – E-4).

Petitioner argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime. (App. E-4 – E-9). That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*, 634 A.2d at 1112.

Every day that Petitioner Fiore remains imprisoned, a fundamental breach of due process occurs. An innocent man who was not, could not and cannot be proven guilty of every element of the crime has been convicted. The District Court correctly invoked the writ of habeas corpus to correct this grave injustice. This Court should grant this Petition to review the Court of Appeals' erroneous reversal of the District Court. An injustice of this magnitude warrants attention by this Court.

B. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Apart from the fact that Petitioner Fiore is incarcerated for a crime he did not commit, this case presents the related issue of a denial of his right to due process and equal protection under the law. The plethora of cases decided by this Court prohibit the Commonwealth of Pennsylvania from punishing Petitioner Fiore while setting co-defendant David Scarpone free. Scarpone has been exonerated by the Pennsylvania Supreme Court on all charges related to the charge of operating a hazardous waste facility without a permit.[4] Petitioner Fiore, meanwhile, is unjustly incarcerated for precisely that offense. The District Court corrected this injustice, but the Court of Appeals again stripped Petitioner Fiore of his constitutional rights.

1. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its

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[4] As noted above, the Pennsylvania Supreme Court affirmed the intermediate appellate court's decision to reverse Scarpone's conviction on the basis that the Commonwealth factually could not prove all the elements of the crime because Scarpone and Fiore had a DER permit. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993).

terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The Equal Protection Clause guarantees that local, state and federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

Governmental actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Under this standard of review, the government-made classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972).

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[5] Accordingly, the

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[5] The concept that personal liberty is a fundamentally protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the court recognized that the primary purpose of federal habeas proceedings is to protect a citizen's fundamental right to be free of being wrongfully held in

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similar to Mr. Scarpone.

2. The Due Process Clause

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 559 (1974), citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

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custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is, improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424.

The facts clearly establish: (1) that Petitioner has been treated dissimilarly from Mr. Scarpone, based on the evidence and law; and (2) that the Commonwealth has no compelling reason for this difference.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar. On a writ of *coram nobis*, it was asked retroactively to apply a United States Supreme Court decision to a prior conviction. In deciding to grant the writ of *coram nobis*, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971), and determined that its decision was based on "the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F.2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346.

Finally, the *Davis* Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47 (internal citations omitted).

Here, as in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. There is no rational basis, let alone a compelling reason, for setting Mr. Scarpone free while continuing to punish Petitioner Fiore. Further, the erratic, unjustifiable treatment constitutes a situation cognizable under the habeas corpus statute. The continued deprivation of Petitioner Fiore's constitutional rights should be addressed by this Court.

C. RETROACTIVE APPLICATION OF SCARPONE DECISION

The final issue, which relates to the grounds upon which the Court of Appeals rationalized the reversal of the grant of habeas relief, raises an important issue of how the principle of nonretroactivity applies. This principle prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), citing *Stringer v. Black*, 503 U.S. 222 (1992).

In this case the Court of Appeals reversed the District Court's grant of habeas relief by artificially characterizing the relief sought as a violation of the prohibition against retroactively applying a new rule of law. (App. A-2).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court clarified how the question of retroactivity should be resolved for cases on collateral review. A plurality of this Court refused to reach the merits of the case, holding that as a general rule *new* rules of law should not be applied retroactively on collateral review. *Id.* at 310.

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

In this case, the alleged new rule of law arose from an intermediate appellate court-decision reversing David Scarpone's conviction which was affirmed by the Pennsylvania Supreme Court. *See Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (1993). However, there was no new rule of law. The Supreme Court simply held that the facts did not support a conviction because a DER permit existed. *Id.* at 1112. Petitioner and his co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. Petitioner Fiore is simply seeking consistency on the basis of the same facts.

The *Scarpone* Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is based simply on the black letter principle that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth posited such an argument. Moreover, this principle itself is embraced by statute. *See* 1 Pa. C.S.A. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth reasonably could have relied in prosecuting Petitioner under its interpretation of the law. The obvious result reached by the Pennsylvania Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only

interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States*, 483 U.S. 350 (1987), this Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.

Subsequent to the United States Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett* (No. 87-C-8978 (85-CR-284) N.D. Ill. 1988) (App. F), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was this Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals. (App. F-1).

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute. (App. F-8 – F-10).

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos*:

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Wade, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See* 1 Pa. C.S.A. § 1928(b)(1); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Petitioner's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1966). As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, as the District Court noted, the Pennsylvania Supreme Court's ruling in *Scarpone* simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, what are the actual elements of the offense. (App. E-11 – E-12; E-14 – E-15).

The Commonwealth cannot argue that it was surprised by the Pennsylvania Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the DER permit was repudiated by Petitioner's and Mr. Scarpone's actions, was raised during the course of the trial when the trial judge was asked to clarify the instructions to the jury. As such, the nonretroactivity principle has no role in this case.

The Court of Appeals decision in this case distorts this Court's nonretroactivity principle. It expands its scope far beyond this Court's original intentions. The impact is that no remedy exists for a state prisoner who is imprisoned in violation of his due process rights. The Third Circuit's ruling negates the role for habeas corpus relief intended by Congress.

In the alternative, even assuming *arguendo* that Petitioner was seeking the benefit of a new rule, the *Scarpone* decision falls within exceptions to the nonretroactivity principle.[b] *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993). Specifically, the *Scarpone* decision determined that the primary conduct of co-defendants David Scarpone and Petitioner Fiore was beyond criminal sanction. Thus, Petition Fiore is entitled to the benefit of that decision.

This exception to the nonretroactivity principle was fully explained in *Mackey v. United States*, 401 U.S. 667, 675 (1971), which explains that nonretroactivity, as a general matter, applied to new " 'procedural due process' rules, that is, those applications of the constitution that

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[b] This Court has held that two exceptions apply to this rule. The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Saffle v. Parks*, 494 U.S. at 495. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), *aff'd* 536 F.2d 1013 (3d Cir. 1976).

forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692. However, the *Mackey* court explained:

> new "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), in support of this quotation. In *United States Coin & Currency*, this Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment

defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal. *Id.* at 724; *see also Robinson v. Neil*, 409 U.S. 505, 509 (1973).

Similarly here, Petitioner's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, even if the *Scarpone* decision was a "new rule," the facts of this case fall within the exception to the nonretroactivity principle.

The Court of Appeals' refusal to follow the well-established nonretroactivity rule and its carved out exceptions set forth by this Court creates a split from the other Circuits that properly apply this Court's rule. As a result, citizens within the jurisdiction of the Third Circuit have lesser rights to avoid basic injustice of wrongful conviction and confinement than do those of other Circuits. This Court should grant this Petition to protect citizens including Petitioner Fiore from such a fundamental disparity.

CONCLUSION

In this action, Petitioner Fiore seeks to remedy a breach of his due process rights which has rendered him incarcerated for years based on his conviction of a crime of operating a solid waste disposal facility without the required state permit, when his employee, who was charged and convicted of the same crime, was released from that conviction by the Pennsylvania Appellate

Courts. For ten years, Petitioner Fiore has brought this issue to the attention of the Pennsylvania State Courts seeking nothing more than to be treated equally to Scarpone, his one-time employee and co-defendant. For unfathomable reasons, Pennsylvania Courts refuse to give Petitioner Fiore relief from this conviction which is indisputably based on insufficient evidence. Upon exhausting all remedies in state court, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania and was afforded the relief he requested. Thereafter, the Third Circuit Court of Appeals reversed that decision based upon an unconstitutional analysis which denies liberty to an innocent man as it endangers the freedom of the citizenry.

To remedy this miscarriage of justice, Petitioner William Fiore urges this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Filed July 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 96-01231)

Argued on March 9, 1998

Before: STAPLETON and ALITO, *Circuit Judges*, and SHADUR, *District Judge**

(Opinion Filed: July 21, 1998)

D. MICHAEL FISHER
Attorney General
WILLIAM H. RYAN, JR.
Executive Deputy Attorney General
ROBERT A. GRACI
Chief Deputy Attorney General

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*Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

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OPINION OF THE COURT

ALITO, *Circuit Judge:*

This is an appeal from an order granting a writ of habeas corpus to William Fiore, a state prisoner in Pennsylvania. The district court granted the writ after concluding that the Supreme Court of Pennsylvania violated Fiore's constitutional rights by failing to apply one of its decisions retroactively. Because state courts are under no constitutional obligation to apply their decisions retroactively, we reverse.

I.

William Fiore owned and operated a waste disposal facility in Elizabeth Township, Pennsylvania, during the late 1970s and early 1980s. In 1983, after the Pennsylvania Department of Environmental Resources (DER) discovered that hazardous wastes were seeping into a monitoring pipe underneath the facility, Fiore instructed the facility's general manger, David Scarpone, to alter the flow of the monitoring pipe. The alteration allowed hazardous wastes to be deposited surreptitiously in a nearby tributary while clean water flowed through the inspected portion of the monitoring pipe. State officials discovered the alteration in 1984 and brought criminal charges against Fiore and Scarpone under the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.101.

Among other things, the criminal information charged that Fiore and Scarpone operated a hazardous waste facility without a permit in violation of 35 P.S. § 6018.401(a), a second degree felony under 35 P.S. § 6018.606(f). Although the state did not dispute the fact that Fiore had obtained a permit from the DER, Supp.App. at 51, the state proceeded on the theory that Fiore and Scarpone "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." *Id.* at 52. Following a jury trial, Fiore and Scarpone were convicted of operating a hazardous waste facility without a permit in violation of §§ 401(a) and 606(f). After a separate non-jury trial involving additional allegations of unauthorized activities, Fiore again was convicted of operating a hazardous waste facility without a permit in violation of

§§ 401(a) and 606(f).[1] On April 10, 1987, the Court of Common Pleas sentenced Fiore to a prison term of two and one-half to five years, plus ten years' probation, for the jury-trial conviction under §§ 401(a) and 606(f). The court then sentenced Fiore to a consecutive prison term of two and one-half to five years, plus ten years' probation, for the non-jury-trial conviction under §§ 401(a) and 606(f). In addition, the court imposed a fine of $100,000 for each conviction under §§ 401(a) and 606(f).

On direct appeal to the Pennsylvania Superior Court,[2] Fiore contended that there was insufficient evidence to sustain his convictions under §§ 401(a) and 606(f) in light of the fact that he possessed a permit to operate a hazardous waste facility. The Superior Court rejected this argument and adopted the trial court's reasoning that Fiore's actions "represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'un-permitted.' " App. 51, 63-64, 125-26. Fiore's convictions became final when the Supreme Court of Pennsylvania denied his petition for allowance of appeal on March 13, 1990.

More than a year after Fiore exhausted his direct appeal, the Commonwealth Court of Pennsylvania

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[1] Between his two trials, Fiore was convicted of sixty counts of violating the SWMA and other statutes. Only the § 401(a) convictions are at issue here.

[2] While the Commonwealth Court normally exercises jurisdiction over appeals from SWMA convictions, Fiore successfully petitioned to have his case transferred to the Superior Court. *See Commonwealth v. Fiore*, 665 A.2d 1185, 1187 (Pa. Super. Ct. 1995). As a result, Fiore and Scarpone had their appeals heard by different courts.

reversed Scarpone's conviction under §§ 401(a) and 606(f). *Scarpone v. Commonwealth*, 596 A.2d 892, 895 (Pa. Commw. Ct. 1991). The Commonwealth Court concluded that *Scarpone* could not be convicted of operating a hazardous waste facility without a permit when Fiore actually possessed a permit for the facility. *Id.* In reaching this conclusion, the court explained that it would have been more appropriate to charge *Scarpone* with violating the terms of a permit, a first-degree felony under the SWMA. *Id.* The Supreme Court of Pennsylvania granted review in Scarpone's case, and Fiore filed a petition for extraordinary relief asking the Supreme Court to consolidate his case with Scarpone's. After denying Fiore's petition, the court affirmed the reversal of Scarpone's conviction. *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993). The court explained:

> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. . . . We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Id.

Following the Supreme Court of Pennsylvania's decision in *Scarpone*, Fiore again sought extraordinary relief, and again his application was denied. Fiore then filed a

petition pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 P.S. § 9541, claiming that what he was "charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." Supp.App. at 14. The Court of Common Pleas and the Superior Court both denied Fiore's petition on the ground that Pennsylvania law does not allow post-conviction relief in cases where the alleged error was litigated on direct appeal. Supp.App. at 22; *Commonwealth v. Fiore*, 665 A.2d 1185, 1192-93 (Pa. Super. Ct. 1995). In addition, the Superior Court refused to apply the *Scarpone* decision retroactively based on state-law principles of retroactivity. *Id.* at 1193. The Supreme Court of Pennsylvania subsequently denied Fiore's petition for allowance of appeal from the Superior Court's decision.

Fiore then filed a petition for a federal writ of habeas corpus. The petition presented two issues:

> 1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.
>
> 2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

Report of the Magistrate Judge at 11-12.

The magistrate judge concluded that the Supreme Court of Pennsylvania's "failure to grant relief pursuant to *Scarpone* . . . served to deny Fiore due process of law and equal protection of the law." *Id.* at 20. Accordingly, the magistrate judge "recommended that Fiore's petition

for [a] writ of habeas corpus be granted" and "further recommended that the grant of the writ should be accomplished through the retroactive application of" *Scarpone*. *Id.* at 22. The district court adopted the report and recommendation of the magistrate judge and ordered that Fiore be released from the portion of his sentence pertaining to both the jury and non-jury trial convictions under §§ 401(a) and 606(f).

On appeal, the Commonwealth challenges the district court's conclusion that the federal Constitution requires retroactive application of *Scarpone*. We exercise plenary review over this purely legal conclusion. *Yohn v. Love*, 76 F.3d 508, 515 (3d Cir. 1996).

II.

To be eligible for a federal writ of habeas corpus, a state prisoner must show that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).[3] Fiore contends that he meets this requirement because, under the Supreme Court of Pennsylvania's decision in *Scarpone*, his conduct does not constitute the crime with which he was charged. *See In re Winship*, 397 U.S. 358, 364, (1970) ("[T]he Due Process

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[3] Because Fiore filed his § 2254 petition after April 24, 1996, he is subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, § 104, 110 Stat. 1214, 1218-19. However, since we conclude that Fiore cannot succeed on the merits of his claim, we need not decide whether Fiore exhausted his claim, *id.* § 104(b), or whether the state courts adjudicated his claim on the merits. *id.* at § 104(d).

Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Fiore's argument would have force had *Scarpone* been the law in Pennsylvania at the time of his conviction. However, *Scarpone* was decided after Fiore's conviction became final, and the Pennsylvania courts refused to apply the decision to Fiore's case based on state retroactivity principles. *See Commonwealth v. Fiore*, 665 A.2d 1185, 1193 (Pa. Super. Ct. 1995). Since "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68, (1991), Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*.

The district court held, and Fiore maintains on appeal, that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require retroactive application of *Scarpone*. This conclusion, however, is at odds with the Supreme Court's longstanding position that "the federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). *See Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982). While the Court has concluded that some federal criminal decisions should apply retroactively, *see Davis v. United States*, 417 U.S. 333, 346-47 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971), it has made clear that state courts are under no constitutional obligation to apply their own criminal decisions retroactively. *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973). Thus, just as the Supreme Court has

fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane*, 489 U.S. 288, 304-310 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles. As the Supreme Court explained in *Sunburst Oil*:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. . . . [W]e are not at liberty, *for anything contained in the constitution of the United States*, to thrust upon those courts a different conception of the binding force of precedent or of the meaning of judicial process.

287 U.S. at 364-66 (emphasis added) (citations omitted).

Consistent with the Supreme Court's admonition that federal courts not require retroactive application of state judicial decisions, this court has refused to require application of new state decisions in habeas proceedings. In *Martin v. Warden, Huntingdon State Correctional Institution*, 653 F.2d 799 (3d Cir. 1981), the petitioner claimed that the trial court's jury instructions misstated the requirements of the Pennsylvania felony-murder rule. *Id.* at 810. Although the Supreme Court of Pennsylvania rejected

Martin's argument on direct appeal, it subsequently interpreted the felony-murder rule in a manner that cast doubt on the charge given in Martin's case. *Id.* at 810-11. We rejected Martin's argument for retroactive application of the new decision, stating:

> Even were [the new decision] to be given retroactive effect . . . it would not be the responsibility of a federal court to apply this newly formed state decisional law to a state conviction obtained almost a decade ago. Martin's remedy on such a claim is not in this court. Therefore, under the *then-existing* Pennsylvania law of felony murder, the judge adequately charged the jury. . . .

Id. at 811 (emphasis added). *Accord Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995) (denying habeas relief to a state prisoner because "[n]o federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively"). In light of this court's decision in *Martin*, as well as the Supreme Court's rulings in *Sunburst Oil* and *Wainwright*, we must reject Fiore's argument that the constitution requires retroactive application of the *Scarpone* decision.

Our conclusion is not altered by Fiore's reliance on *Davis v. United States*, 417 U.S. 333, 346 (1974). In *Davis*, the Supreme Court reviewed a § 2255 petition filed by a federal prisoner who had been convicted under the Selective Service Act for failing to comply with an induction order. On Davis' direct appeal, the Ninth Circuit had concluded that his induction order was valid and that he could be prosecuted for failing to comply with the order.

In a subsequent case, however, the same court found that an induction order issued under "virtually identical" circumstances was "illegal and created no duty on[the defendant's] part to report for induction." *Id.* at 339-40. *Davis* filed a § 2255 petition based on the new Ninth Circuit decision, and the Supreme Court held that *Davis* raised a cognizable claim. The Court explained:

> If [Davis'] contention is well taken, then [his] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255.

Id. at 346-47 (internal quotations and alterations omitted).

Based on *Davis*, Fiore contends that he is entitled to retroactive application of the *Scarpone* decision. However, Fiore's argument fails to account for the fact that *Davis* concerned the interpretation of a federal, not state, statute. Section 2255 allows federal prisoners tc assert habeas claims if their confinement is "in violation of the Constitution *or laws* of the United States." 28 U.S.C. § 2255 (emphasis added). Since *Davis* claimed that his conviction resulted from an improper construction of a federal statute, the Supreme Court allowed him to seek relief without alleging a violation of the Constitution. *See Davis* 417 U.S. at 342-346 (relying solely on the "or laws" language of § 2255). Fiore, by contrast, must allege a violation of the Constitution since there is no federal statute at issue in his case. Given that the *Davis* Court never mentioned a constitutional basis for its decision, and given that the Supreme Court explicitly has held that the Constitution

does not require retroactive application of state criminal decisions, *Wainwright*, 414 U.S. at 23-24, we reject Fiore's contention that he has a due process right under *Davis* to have the *Scarpone* decision applied retroactively.[4]

We likewise are unconvinced by Fiore's equal protection argument. Fiore maintains that Pennsylvania is treating him differently from *Scarpone* with respect to his "fundamentally protected right to liberty." Appellee's Br. at 17-18. Admittedly, this argument has intuitive appeal: Fiore and Scarpone were tried together for the same crime, convicted on the same facts, and the Pennsylvania courts have concluded that Fiore can be imprisoned while *Scarpone* must be released. Nevertheless, Fiore's equal

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[4] In holding that the *Davis* retroactivity rule is not required by the Due Process Clause, we join several other circuits. *See Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997); *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996), *cert. granted on other grounds*, 118 S.Ct. 361 (1997); *Brennan v. United States*, 867 F.2d 111, 121 (2d Cir. 1989).

We note that the Supreme Court recently reaffirmed *Davis* in *Bousley v. United States*, 118 S.Ct. 1604, 1610 (1998). *Bousley* involved a federal prisoner who filed a motion under 28 U.S.C. § 2255 seeking retroactive application of the Supreme Court's interpretation of 18 U.S.C. § 924(c)(1) in *Bailey v. United States*, 516 U.S. 137, 144 (1995). The *Bousley* Court held that *Bailey*'s interpretation of § 924(c)(1) was fully retroactive, explaining that "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 118 S.Ct. at 1610. *See also id.* at 1612 (Stevens, J., concurring) (*Bailey* "did not change the law. It merely explained what § 924(c) had meant ever since the statute had been enacted."). Because the *Bousley* decision rested on the Supreme Court's understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute.

protection claim cannot be reconciled with the Supreme Court's retroactivity jurisprudence. While the Court has recognized that "the principle of treating similarly situated defendants the same" should be considered in shaping federal retroactivity rules, *Teague v. Lane*, 489 U.S. 288, 304 (1989) (plurality), the Court never has tied application of this principle to the Equal Protection Clause. In fact, the *Teague* rule itself – which largely denies the benefit of new constitutional rules to defendants on collateral review, *id.* at 310 – inevitably results in the differential treatment of defendants who, while convicted at the same time, exhaust their direct appeals at different times. Were we to accept Fiore's equal protection argument, we would be casting doubt on *Teague* and its progeny. Moreover, we would be carving out an exception to the rule that the "the federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). *See Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973). Since it is not the role of this court to second guess the decisions of the Supreme Court, we reject Fiore's claim that the Equal Protection Clause requires the *Scarpone* decision to be retroactively applied.

In sum, we conclude that neither the Due Process Clause nor the Equal Protection Clause mandates retroactive application of the Supreme Court of Pennsylvania's decision in *Scarpone*. Accordingly, we reverse the district court's grant of a writ of habeas corpus.

When a decision providing a new interpretation of a state criminal statute is not made fully retroactive, some defendants convicted prior to the new interpretation will

almost always continue to suffer the consequences of a conviction based on conduct that would not constitute a crime under the new interpretation, and that is the fate that has befallen Fiore. His situation is particularly striking because the new interpretation was handed down by the state courts in his co-defendant's appeal, which happened to follow a different procedural track. However, any relaxation of the Pennsylvania rules regarding retroactivity due to the particular circumstances present in this case must come from the Pennsylvania courts or the governor. Although we might be inclined to grant relief if it were within our power, the limitations of our authority under the habeas corpus statute prevent us from doing so.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the state Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 96-01231)

Present: Stapleton and Alito, *Circuit Judges*, and Shadur, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 9, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District court entered April 25, 1997, be, and the same is

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* Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

hereby reversed. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: July 21, 1998

Certified as a true copy and issued in lieu of a formal mandate on October 1, 1998.

Teste: /s/ P. Douglas Sisk
Clerk,
United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-3288

WILLIAM FIORE

Appellant,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, STAPLETON, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, McKEE, and
RENDELL, *Circuit Judges*, and
SHADUR, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

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* As to panel rehearing only.

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Scirica
Circuit Judge

DATED: SEP 23, 1998
Sma CCTO:JL, HG, AM, MC

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, v. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Civil Action No. 96-1231 Re: Docs. # 1, 12, 13 and 14 JUDGE LANCASTER MAGISTRATE JUDGE CAIAZZA

MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on June 28, 1996, and was referred to United States Magistrate Judge Francis X. Caiazza for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on February 27, 1997, recommended that the petition be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on

petitioner by delivery to his counsel James B. Lieber by First Class United States Mail and on the respondents. Objections were filed by the respondents on March 14, 1997. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 24th day of April, 1997.

IT IS HEREBY ORDERED that the petition for writ of habeas corpus filed by the petitioner is granted.

IT IS FURTHER ORDERED that the respondents shall release the petitioner from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and the non-jury trial convictions under 35 P.S. Section 6018.401(a) and Section 6018.606(f).

The report and recommendation of Magistrate Judge Caiazza, dated February 27, 1997, is adopted as the opinion of the court.

/s/ Gary L. Lancaster
GARY L. LANCASTER
United States
District Court Judge

cc: Francis X. Caiazza
U.S. Magistrate Judge

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, v. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	Civil Action No. 96-1231 Re: Doc. # 1 JUDGE LANCASTER MAGISTRATE JUDGE CAIAZZA

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.

RECOMMENDATION

It is recommended that the petition for writ of habeas corpus filed by the petitioner, William Fiore, at document number one be granted.

II

REPORT

On February 18, 1986, a jury in the Allegheny County Court of Common Pleas (Court of Common Pleas) convicted Petitioner William Fiore (Fiore) of violating the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. Sections 6018.101 *et. seq.*, (Resp. to Pet. For Writ of Habeas Corpus Ex. C at 2.) Based upon conflicting judgments from the intermediate appellate courts of Pennsylvania, Fiore's petition for writ of habeas corpus (petition) raises a complex federal constitutional challenge to his conviction involving the retroactive application of a Pennsylvania Supreme Court decision. For purposes of clarity, the report section shall detail the lengthy procedural history of this case and shall summarize the underlying facts as stated by the Commonwealth Court of Pennsylvania (Commonwealth Court).

A. Facts[1]

In 1979, the Pennsylvania Department of Environmental Resources (DER) granted Fiore a permit to operate a waste disposal facility in Elizabeth Township, Allegheny County Pennsylvania. The facility included an underground monitoring pipe which inspectors from the DER used to monitor the leakage of hazardous wastes from a pit which held industrial wastes. Inspectors from the DER discovered hazardous wastes leaking from the

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[1] The facts set forth in this section were summarized from the opinion of the Commonwealth Court filed at *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 896 (1991).

pit in 1982 and 1983 and informed Fiore that future deposits to the pit would not be approved until the leakage was rectified.

Fiore subsequently instructed David Scarpone (Scarpone), the facility's general manager, to alter the flow of the monitoring pipe in July 1983. His order was accomplished by excavating the area around the monitoring pipe, capping its intake, and installing a smaller pipe to bring uncontaminated water to the monitoring pipe. Inspectors from the DER discovered the alteration and criminal charges were then filed against Fiore and Scarpone under the SWMA. Count I of the charges filed against Fiore stated the following:

> The defendant William Fiore did operate a hazardous waste disposal facility without a permit from the DER for such disposal facility, to wit, the defendant operated his hazardous waste disposal facility in Elizabeth Township, Allegheny County following alterations, carried out by accomplices and others acting under his direction, of its approved monitoring pipes in 1983 without a permit from the DER for such a facility, in violation of 35 P.S. § 6018.401(a), a felony of the second degree pursuant to 35 P.S. § 6018.606(f).

Fiore and Scarpone were tried as co-defendants in a jury trial held in the Court of Common Pleas. At the close of the jury trial, Fiore was convicted of Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit, Discharging Industrial Wastes Without a Permit, Disposing of Residual Wastes and Operating a Residual Waste Facility Contrary to his Permit, Perjury, Obstruction of Administration of the Law

and Criminal Conspiracy. (Resp. To Pet. for Writ of Habeas Corpus Ex. C at 2.) Scarpone was convicted of causing and assisting in the operation of a hazardous waste disposal facility without a permit in violation of the SWMA, Obstructing the Administration of Law and Other Government Functions, and Conspiracy. *Commonwealth v. Scarpone*, 141 Pa. Cmwlth 560, 596 A.2d 892 (1991).

Fiore was also tried separately in a non-jury trial on July 2, 1986, on charges which did not pertain to Scarpone. At the close of that trial, Fiore was convicted of Discharging Industrial Wastes Without a Permit, Disposing of Hazardous Wastes and Operating a Hazardous Waste Disposal Facility Without a Permit, Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit, Using Property and Property of Another as a Solid Waste Disposal Area Without a Permit, and Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit. (Resp. to Pet. for Writ of Habeas Corpus Ex. C at 2.)

B. Procedural History

As appears *supra*, a jury in the Court of Common Pleas convicted Fiore and his co-defendant, David Scarpone (Scarpone), of violating sections 401(a) and 606(f) of the SWMA. On April 10, 1987, the Court of Common Pleas sentenced Fiore to a term of incarceration of two and one half years to five years and imposed a fine of $100,000 for the SWMA conviction which was related to the jury trial. (Br. in Supp. of Pet. for Writ of Habeas Corpus at 7; Resp. to Pet. For Writ of Habeas Corpus, Ex.

C at 3.) That same day the Court of Common Pleas also sentenced Fiore to a consecutive period of incarceration of two and one half years to five years and imposed a fine of $100,000 for the SWMA conviction which was related to the non-jury trial.

Fiore and Scarpone both appealed their respective judgments of sentence that were imposed by the Court of Common Pleas. Fiore appealed to the Superior Court of Pennsylvania (Superior Court); Scarpone appealed to the Commonwealth Court of Pennsylvania (Commonwealth Court).[2] (*Id.*) The Superior Court *sua sponte* transferred Fiore's appeal to the Commonwealth Court; however, upon Fiore's motion, his appeal was subsequently transferred back to the Superior Court. (Id. at I.)

On May 12, 1989, the Superior Court filed a memorandum opinion which affirmed Fiore's judgment of sentence for the convictions from both the jury and the non-jury trials. (Resp. to Pet. For Writ of Habeas Corpus Ex. 5.) Although Fiore's appeal to the Superior Court raised twenty-two issues, the court did not analyze the merits of any of the claims. Instead, the Superior Court affirmed solely upon the opinion of the Court of Common Pleas which specifically stated the following:

> [T]he defendant's alterations of the 810 pipe represented such a significant departure from

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[2] The Commonwealth Court has jurisdiction over appeals involving the SWMA pursuant to 42 Pa. C.S. Section 762(a)(2)(ii). The Superior Court has appellate jurisdiction over all appeals from a final order of a court of common pleas. 42 Pa. C.S. Section 742.

> the terms of the existing permit that the operation of the hazardous waste facility was "unpermitted" after the alterations were taken. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered.

(*Id.* Ex. 5 at 2 and 3; *Commonwealth v. Fiore*, 445 Pa Super. 401, 415-6, 665 A.2d 1185, 1192 (1995).) On March 13, 1990, Fiore's direct appeal was concluded after the Supreme Court of Pennsylvania (Supreme Court) denied his petition for allowance of appeal filed at No. 310 W.D. Allocatur Docket 1989. (Br. in Supp. of Pet. For Writ of Habeas Corpus at 8.)

The Commonwealth Court did not enter judgment on Scarpone's appeal until a year after Fiore's direct appeal became final. However, on August 5, 1991, the Commonwealth Court reversed Scarpone's conviction in an opinion published as *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 892 (1991). The Commonwealth Court noted that Scarpone had been charged with violating section 401(a) and section 606(f) of the SWMA. *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 892 (1991). Section 401(a) provides, in pertinent part:

> . . . no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department. . . .

35 P.S. Section 6018.401(a). Section 606(f) states:

> Any person who stores, transports, treats or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. Section 6018.606(f)

The Commonwealth Court strictly interpreted the language and the penal nature of these provisions. *Scarpone,* 141 Pa. Cmwlth. at 567, 596 A.2d at 895 (1991). It essentially concluded that Scarpone could not be convicted of operating a hazardous waste facility without a permit because the DER had issued a valid permit for the operation of the facility. *Id.*

After Scarpone's conviction was reversed, the Supreme Court granted the petition for allowance of appeal filed by the Commonwealth. (Pet. for Writ of Habeas Corpus at 8.) During the pendency of this appeal, Fiore filed an Application for Extraordinary Relief in the Supreme Court which argued that the Commonwealth Court's reversal in Scarpone's appeal and the Superior Court's affirmance in his appeal were contradictory and inherently unfair. (*Id.*) On March 25, 1992, the Supreme Court denied Fiore's application.

On December 15, 1993, the Supreme Court affirmed the Commonwealth Court in an opinion published as *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109

(1993). The Supreme Court initially recognized that the clearly conflicting opinions of the Superior Court and the Commonwealth Court "[left] the Attorney General's office ill-advised on how it should proceed . . . " *Commonwealth v. Scarpone,* 535 Pa. 273, 278, 634 A.2d 1109, 1112. (1993). In concurrence with the rationale of the Commonwealth Court, the Supreme Court determined that Scarpone could not be convicted of operating a waste disposal facility without a permit under section 401(a) because the DER had, in fact, issued a permit. *Scarpone,* 535 Pa. at 278-9, 634 A.2d at 1111-2. The Supreme Court also confirmed that the penal provisions of a statute should be strictly construed and that it would have been more appropriate to charge Scarpone under the provisions of the SWMA which pertain to violations of the conditions of a permit. (*Id.*)

On January 24, 1994, Fiore filed an Emergency Petition for Extraordinary Relief in the Supreme Court. (Pet. For Writ of Habeas Corpus at 9.) The motion requested the Supreme Court to exercise plenary jurisdiction pursuant to its King's Bench powers. The Supreme Court denied Fiore's emergency petition on March 22, 1994. (*Id.*)

On March 28, 1994, Fiore filed a Petition for Post Conviction Collateral Relief (PCRA) under 42 Pa. C.S.A. Section 9545 *et. seq.* in the Court of Common Pleas. His PCRA petition requested the court to vacate his sentence because the Supreme Court determined in *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109 (1993) that he did not, in fact, violate the section of the SWMA which served as the basis of his charge. (Resp. to Pet. For Writ of Habeas Corpus, Ex. K at 8.) On August 18, 1994, the Court of Common Pleas denied Fiore's PCRA petition on

the basis that the Supreme Court did not issue its decision in Scarpone's appeal until approximately four years after Fiore's direct appeal became final. (Resp. to Pet. For Writ of Habeas Corpus Ex. H.)

Next, Fiore appealed the denial of his PCRA petition to the Commonwealth Court on August 29, 1994; however, upon the motion of the Commonwealth, it transferred Fiore's appeal to the Superior Court. (Pet. For Writ of Habeas Corpus at 10.) On September 20, 1995, the Superior Court affirmed the Court of Common Pleas in an opinion published as *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995). (Resp. to Pet. For Writ of Habeas Corpus, Ex. K.) The Superior Court concluded that Fiore was not eligible for collateral relief because his allegation of error had been previously litigated. The Superior Court also concluded pursuant to *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), that Fiore was not entitled to a retroactive application of the Supreme Court's decision in *Scarpone* because his direct appeal was already final when the Supreme Court filed its opinion.

In an Emergency Application for Extraordinary Relief filed on October 18, 1994, Fiore again urged the Supreme Court to exercise its King's Bench powers to set aside his conviction under section 401 of the SWMA.

C. Issues Presented

Fiore's petition presents two issues:

> 1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.

> 2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(Pet. for Writ of Habeas Corpus at 5.)

D. Discussion

The first issue that must be addressed by a federal district court when considering a habeas corpus petition filed by a state prisoner is whether the prisoner has exhausted available state court remedies as required by 28 U.S.C. § 2254(b) and (c). Section 2254(b) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. 28 U.S.C. § 2254(b).

Furthermore, § 2254(c) provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c).

A federal district court will not entertain a state prisoner's application for writ of habeas corpus unless

the petitioner has first exhausted the remedies available to him in the state courts. 28 U.S.C. § 2254 (b), (c); *Picard v. Connor,* 404 U.S. 270 (1971). The exhaustion requirement is satisfied when the petitioner has afforded the state's highest court a fair opportunity to address the claim. *Anderson v. Harless,* 459 U.S. 4 (1982). "Fair presentation requires that before a particular claim may be asserted in federal court, the same method of analysis must have been made available to the state courts." *Chaussard v. Fulcomer,* 816 F.2d 925, 928 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 139 (1987) (*quoting Picard v. Connor,* 404 U.S. 270). For a federal court to maintain the petition, *all* constitutional claims contained in the petition must be exhausted; petitions containing both exhausted and unexhausted claims must be dismissed in their entirety. *Rose v. Lundy,* 455 U.S. 509 (1982) (emphasis added).

Here, the record establishes that the issues presented in Fiore's petition for writ of habeas corpus have been repeatedly presented to the Supreme Court either through a direct appeal, a PCRA petition or an Emergency Petition for Extraordinary Relief. Accordingly, Fiore's petition satisfies the threshold exhaustion requirement.

The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based upon the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit

under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.

Additionally, the Supreme Court was internally inconsistent with its respective rulings. In Fiore's appeal, it summarily affirmed the Superior Court by denying allocatur. However, the Supreme Court granted allocatur to Scarpone. It then affirmed the Commonwealth Court with the following analysis.

> We find that the Commc alth did not make out the crime of operatin waste disposal facility without a permit a Mr. Scarpone under the statute. Simply pu carpone did have a permit. A more appr e charge may have been brought under alternative provisions of the statute, viz., 35 P.S. Sections 6018.606(g) and 6018.601.
>
> . . .
>
> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa. C.S. Section 1928(b)(1).

Scarpone v. Commonwealth, 535 Pa. 273, 279, 634 A.2d 1109, 1112 (1991). Without comment, the Supreme Court subsequently refused to apply its decision to Fiore through an exercise of its Kings Bench powers.[3]

Fiore's petition for writ of habeas corpus currently before the court for review seeks a retroactive application of the Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). Generally, civil and criminal cases which are open on direct review must receive the full retroactive effect of a judicial decision decided during the pendency of an appeal. *United States v. McKie*, 73 F.3d 1149, 1152 (D.C. Cir. 1996), *quoting Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). Once a judgment has become final, civil litigants can not seek retroactive application of a judicial decision in a collateral attack. *McKie*, 73 F.3d at 1152. However, a convicted criminal can collaterally attack a final judgment by filing a petition for writ of habeas corpus. *See* 28 U.S.C. § 2254 and § 2255; *See also McKie*, 73 F.3d at 1152.

Retroactive application of a judicial decision pursuant to a petition for writ of habeas corpus is conditioned upon whether the nature of the decision is procedural or substantive. *See United States v. Woods*, 986

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[3] During the PCRA proceedings, the Court of Common Pleas and the Superior Court noted the Supreme Court's failure to provide an explanation for denying Fiore's petitions for extraordinary relief. Neither court determined the underlying reason which supported the Supreme Court's decision to not grant extraordinary relief to Fiore and both speculated that the Supreme Court's actions were taken to finalize Fiore's judgment. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 417, 665 A.2d 1185, 1193 (1995).

F.2d 669, 676 (1993), *cert. denied*, 510 U.S. 825 (1993). In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court determined that new criminal procedural rules should not be given retroactive effect unless: (1) "it places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 306 (1989) (citations and internal quotations omitted).

In *Davis v. United States*, 417 U.S. 333 (1984), the United States Supreme Court held that the appropriate inquiry for the retroactive application of a change in the criminal law is whether "the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice and . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States*, 417 U.S. 333, 346 (1984) (internal citations and quotations omitted).

The Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) did not establish a new rule of criminal procedure. As a consequence, the *Teague* standard does not apply to Fiore's petition. However, in contrast to *Davis*, the Supreme Court also did not fashion a change in the criminal law as was done in *Davis*. Rather, the Supreme Court in *Scarpone* interpreted the SWMA under the facts supporting the

conviction of the defendant; hence, analytically, *Scarpone* essentially represents a statutory construction decision.[4]

In *United States v. Woods*, 986 F.2d 669 (3d Cir. 1993), *cert. denied*, 510 U.S. 826 (1993), the United States Court of Appeals for the Third Circuit (Third Circuit) was presented with an analogous circumstance in which the appellant sought the retroactive application of the United States Supreme Court's opinion in *Hughey v. United States*, 495 U.S. 411 (1990). The Third Circuit recognized that *Hughey* was a statutory construction case which could not be neatly defined as either a case prescribing a new criminal rule or a case announcing a change in the criminal law. *Woods*, 986 F.2d at 672-8. Accordingly, the court fashioned a hybrid standard based upon adherence to the two key principles established in *Teague* and *Davis: viz.*, (1) judicial decisions are retroactively applied only in exceptional circumstances which require substantial justification; (2) retroactive application is appropriate if the failure to provide retroactive relief would result in an egregious injustice. *Id.*, at 678. Based upon these principles the Court of Appeals for the Third Circuit applied a heightened *Davis* standard which required the petitioner to establish more than a miscarriage of justice as in *Davis* but less than the narrow exceptions stated in *Teague*.

At this juncture, *Davis* provides a point for initiating an analysis of the facts in the case *sub judice*. Fiore and his co-defendant were convicted of violating the SWMA. The

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[4] The briefs filed by Fiore and the Commonwealth concur that the *Scarpone* holding was based upon statutory construction. (Br. in Supp. of Writ of Habeas Corpus at 23; Br. in Resp. to Pet. For Writ of Habeas Corpus at 14.)

same facts supported both convictions; however, one intermediate appellate court affirmed Fiore's conviction and another reversed his co-defendant's conviction. The Supreme Court of Pennsylvania agreed with the rationale of the intermediate court which reversed the co-defendant's conviction; *viz.*, that there can be no conviction of operating a waste facility without a permit under sections 401(a) and 606(f) of the SWMA where the DER has, in fact, issued a permit for the operation of the facility. "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 1519 (1994). Accordingly, a conviction under section 606(f) is not valid unless the state satisfactorily establishes that the defendant is operating a waste site without a permit.

Although Fiore had altered the monitoring pipe at his facility, it is without dispute that he possessed a permit for its operation. It is also without dispute that he is currently incarcerated because of the interpretation of a statute which the Supreme Court of Pennsylvania held to be improper. In that regard, although the retroactive application of a statute is an exception to the general rules of finality, under these facts the retroactive application of the Pennsylvania Supreme Court's decision in *Scarpone* weighs heavily in favor of Fiore. *Woods*, 986 F.2d at 681. To find otherwise would result in an egregious injustice because it represents a deprivation of Fiore's liberty interest rights. Summarily, the Supreme Court's

failure to grant relief pursuant to *Scarpone* on the apparent basis of finality served to deny Fiore due process of law and equal protection of the law.

E. Conclusion

Pursuant to 28 U.S.C.A. § 2241(a), a writ of habeas corpus may be granted by a district court within its respective jurisdiction. 28 U.S.C.A. § 2241(a). The writ provides the district court with the power to order an official "to produce the body of a person in custody" and gives the issuing court jurisdiction "to free the person in custody from the restraints imposed upon his liberty if it determines the custody is illegal." *Barry v. Brower*, 864 F.2d 294, 301 (3d Cir. 1988).

The circumstances pertaining to Fiore's incarceration are exceptional because his conviction was affirmed by one intermediate state appellate court and his co-defendant's conviction was reversed by a different intermediate state appellate court. Fiore's situation is also unusual because he remained incarcerated while the affirmation of the Supreme Court of Pennsylvania set aside the conviction of his co-defendant. Therefore, under the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Fiore is currently incarcerated for actions that did not constitute a violation of the section of the SWMA with which he was charged by the Commonwealth of Pennsylvania. Relatedly, the refusal by the Supreme Court of Pennsylvania to apply its decision to Fiore has resulted in an unjustified deprivation of his liberty interests. Fiore's petition for writ of

habeas corpus seeks retroactive application of the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2 1109 (1993).

Accordingly, it is recommended that Fiore's petition for writ of habeas corpus be granted because his incarceration is in violation of his right to due process of law and equal protection of the law under the Fourteenth Amendment of the United States Constitution. It is further recommended that the grant of the writ should be accomplished through the retroactive application of the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). Finally, it is recommended that upon the retroactive application of *Scarpone* that Fiore be released from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and the non-jury trial convictions under section 401(a) and 606(f) of the SWMA. However, he should be released from incarceration only if he is now not subject to any other legally imposed sentence.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, objections to this report and recommendation are due by March 15, 1997. Responses to objections are due by March 25, 1997.

/s/ Francis X. Caiazza
Francis X. Caiazza
U. S. Magistrate Judge

February 27, 1997
Dated

cc:

U.S. District Judge

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 87 C 8978 (85 CR 284)
V.	)	Hon. Paul E. Plunkett
LEE G. LOVETT	)	

MEMORANDUM OPINION AND ORDER

After a jury trial in federal court, Petitioner Lee Lovett was convicted on two counts of mail fraud and sentenced to three months in prison and five years probation. Lovett's conviction was affirmed on appeal. Lovett, who has served his prison sentence but is still on probation, now moves pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence. He asserts that the conviction must be vacated as a result of the Supreme Court's decision in *McNally v. United States*, 107 S.Ct. 2875 (1987), which repudiated the "intangible rights" theory of mail fraud. For the reasons set forth below, we agree with Petitioner, and therefore vacate his conviction and sentence.

Background

In 1980, Lovett was a partner in a Washington, D.C. law firm specializing in communications law. His firm was retained by U.S. Cable Corporation to assist the company in obtaining the cable television franchise for Fox Lake, Illinois. Lovett was indicted on April 29, 1985,

for alleged criminal violations arising from his efforts on behalf of U.S. Cable. He was charged, in essence, with bribing Richard Hamm, the Mayor of Fox Lake, in an effort to ensure that U.S. Cable was awarded the franchise. Count I charged Lovett with conspiring to violate the Travel Act by travelling in interstate commerce to promote bribery under the laws of the state of Illinois. Counts II, III, and IV alleged substantive violations of the Travel Act involving the promotion of bribery. Lovett was also charged, in Counts V and VI, with mail fraud.

The mail fraud counts alleged that Lovett schemed to defraud the Village of its right to the faithful services of Mayor Hamm, its right to have the Village's business conducted free from conflicts of interest and fraud, and its right to make the franchise award with full disclosure of ownership interest; and that he schemed to obtain the cable franchise by means of fraudulent representations.

At the trial before Judge Getsendanner, the main prosecution witness was Mayor Hamm, who had already pled guilty to a crime in connection with the award of the cable franchise. Hamm testified that Lovett had offered him a 5% interest in the local subsidiary of U.S. Cable in return for Hamm's assistance in obtaining the franchise for U.S. Cable. He further testified that he told Lovett that he could not hold the interest in his own name, and that Lovett then suggested placing the interest in the name of a nominee. Lovett, on the other hand, testified that he had not offered Hamm a 5% interest in the company, but rather had only offered him the opportunity to select a local partner to hold a 5% interest. The jury acquitted Lovett on Counts I through IV, the bribery counts, but convicted him of mail fraud on Counts V and VI.

Discussion

Lovett argues that his conviction must be vacated because he was convicted under the "intangible rights" theory of mail fraud, a theory which was recently repudiated by the Supreme Court in *McNally v. United States*, 107 S.Ct. 2875 (1987). Before discussing the merits of Lovett's arguments, we must first address a number of procedural issues.

I.

A. The Availability of Section 2255

In order to seek relief under Section 2255, the Petitioner must be "in custody" for purposes of that provision. Lovett has already completed his prison sentence, but he is still on probation. A person on probation is "in custody" for purposes of a section 2255 motion. *See United States v. Re*, 362 F.2d 641, 643 (2d Cir. 1967). Thus, Lovett clearly meets the custody requirement.[1]

B. Procedural Default

We must also consider the government's argument that Petitioner waived the right to challenge the intangible rights theory by failing to object at trial and on appeal to the government's use of this theory. Despite Petitioner's assertion to the contrary, it appears clear to

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[1] We also note that the error alleged need not be a constitutional one in order to be subject to collateral attack under Section 2255. *See Davis v. United States*, 417 U.S. 333, 345 (1974); *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975).

us that he never challenged the validity of the theory – whether by way of pre-trial motion, objection to the relevant jury instructions, post-trial motion, or direct appeal. Instead, he merely argued (in his post-trial motion and on appeal) that there was no criminal fraud because no evidence had been presented which established that Mayor Hamm had actually failed to carry out his duties and responsibilities as the mayor of Fox Lake. *See* Memorandum of Points and Authorities in Support of Motion for Judgment of Acquittal or, in the Alternative, for a New Trial; *United States v. Lovett*, 811 F.2d 979, 984-85 (7th Cir. 1987).

Because of Lovett's previous failure to challenge the intangible rights theory, we may not consider his claim on collateral attack unless he shows both " 'cause' excusing his double procedural default, and 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982). As to cause, we ruled in *Moore v. United States*, 87 C 8542 (slip op. Jan. 14, 1988), another post-*McNally* petition to vacate an intangible rights theory mail fraud conviction, that petitioner indeed had cause not to object to use of the intangible rights theory. We relied in *Moore* on *Reed v. Ross*, 468 U.S. 1 (1984), where the Supreme Court held that the cause requirement is satisfied when existing law did not afford petitioner a "reasonable basis" for the claim at issue at the time of trial and appeal. *McNally*'s repudiation of the intangible rights theory was such a clear break with the past, we held, that a head-on attack on the intangible rights theory was not a claim reasonably available to counsel at the time of petitioner's trial and appeal. The government has brought to our attention Judge Shadur's

ruling to the contrary in a similar case. *See United States v. Gill*, 84 CR 20020 (slip op. Nov. 3, 1987). However, as we explain below, we remain convinced that adequate cause existed for the failure of one in Lovett's position to challenge the intangible rights theory at trial and on appeal.

In *Reed*, the court reasoned that

> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a . . . procedural bar, just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. . . . Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose.

468 U.S. at 15. The Court therefore went on to hold that cause is present where existing law does not offer a reasonable basis for a particular challenge. More specifically, it indicated that cause will nearly always exist where a decision of the Court "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* at 17 (citation omitted).

We think the existence of cause is clear under the *Reed* standard. Prior to *McNally*, the intangible rights theory was well-entrenched in the Seventh Circuit; the court had explicitly approved its use on numerous occasions. *See* discussion in *Moore*, slip op. at 3. Moreover, the

theory had also been approved by every other circuit which considered it. *See McNally*, 107 S. Ct. 2882-84 and n.1-3 (Stevens, J., dissenting). As the First Circuit noted in *United States v. Ochs*, (slip op. Mar. 15, 1988): "The Supreme Court's decision in *McNally* has been variously described as 'blockbusting,' as 'a total surprise' and as a 'wholly unexpected explication of the law of mail fraud.' It was, without a doubt, a departure from the law of every court of appeals . . . to consider the issue of intangible rights mail fraud prosecutions." *Id.* at 15 (citations omitted) Under these circumstances, we simply cannot say that Lovett's counsel had a reasonable basis in existing law for raising such a challenge.

Unlike Judge Shadur, we do not believe that the Supreme Court's decision in *Smith v. Murray*, 106 S.Ct. 2661 (1986), requires a holding of insufficient cause. Judge Shadur construes *Smith* as holding that "[n]o claim can be said to be 'unavailable' . . . where that claim had previously been made in the lower courts." *Gill*, slip op. at 9. We disagree with this interpretation. In *Smith*, the Court noted that "various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal." 106 S.Ct. at 2667. Where the intangible rights theory was concerned, it appears to us that no "percolation" was going on; instead, it was simply becoming increasingly evident that no appellate court (least of all the Seventh Circuit) was willing to entertain a frontal assault on the intangible rights theory.[2]

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[2] Neither do we believe that the Court's language in *Engle v. Isaac*, 456 U.S. 107, 130 (1982) mandates a finding of insufficient cause in this case. *Engle's* statement to the effect that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial" does give us some pause. However, we believe that the rationale so carefully set forth in the Court's subsequent *Reed* decision strongly supports a finding of cause in this case, and we cannot find that this rationale is overridden by the brief discussion in *Engle*.

In the end, we are brought back to the rationale of *Reed*, and most particularly, to the reasoning of the fourth Circuit's Judge Haynsworth as quoted approvingly by the Court:

> "If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable . . . claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable."

Reed, 468 U.S. at 16. We wholeheartedly agree with these sentiments (which of course apply as aptly to trial as to appellate litigation), and we find that under *Reed* Lovett had sufficient cause for his previous failure to challenge the intangible rights theory.

The prejudice prong of the cause and prejudice test may be dispensed with much more quickly. As we stated in *Moore*, "If [petitioner] succeeds in establishing that the acts which the jury found he committed do not constitute

a federal crime, he has suffered great prejudice. . . . [T]o be convicted and sentenced by a federal court for acts which are not a federal crime seems to us to be the essence of prejudice." *Moore*, slip op. at 3-4.[3] Thus, we find that Lovett has met the cause and prejudice test, and now move on to the last of the threshold barriers – the issue of retroactivity.

C. Retroactivity

Before considering Petitioner's argument that *McNally v. United States* requires vacating his conviction, we must of course step back and consider whether *McNally* applies retroactively to convictions already final. We are convinced that it does so apply. As Judge Smalkin pointed out in *United States v. Mandel*, 672 F. Supp. 864, 874-75 (D. Md. 1987):

> There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive. *See Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975) (habeas corpus); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974) (writ of error *coram nobis*). The backdrop to these cases was the Supreme Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), that Section 1341, the mail fraud statute, does not reach certain credit card schemes to defraud. The courts deciding

[3] Indeed, even had we found Lovett to be in procedural default (through failure to establish cause), we most likely would have allowed his collateral attack notwithstanding the default, in order to avoid a fundamental miscarriage of justice.

> both the *Strauss and Travers* cases permitted collateral attack on pre-*Maze* mail fraud convictions in light of *Maze*. They explained, quite simply, that 'Section 1341 [the mail fraud statue] has always had the meaning given it by the Supreme Court in *Maze*.' "

Similarly, the mail fraud statute has always had the meaning given it by the Court in *McNally*. Thus, *McNally* applies retroactively and we may now weigh the merits of Petitioner's argument that his conviction must be vacated in light of *McNally*.

II.

A. *McNally*

In *McNally*, the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. 1341, which prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." It held that the mail fraud statute applies only to schemes to defraud others of money or property rights; it does not proscribe schemes to defraud citizens of an intangible right to honest and impartial government. Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed that it could convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Court reversed

petitioners' convictions because the jury had not been required to find that the state was defrauded of any money or property in order to convict. Reversal was necessitated because the jury instruction permitted a conviction for conduct (deprivation of the right to good government) not within the scope of Section 1341.

B. The Effect of McNally on Lovett's Conviction

Lovett's indictment contained both an intangible rights prong and a property prong. It alleged that Lovett devised and intended to devise and participate in a scheme to defraud.

> (a) the Village of Fox Lake and its citizens of their right to the legal, faithful and honest services of Richard Hamm in the performance of acts related to his public employment;
>
> (b) the Village of Fox Lake and its citizens, public officials and its public employees of the right to have the business of the Village of Fox Lake conducted honestly, fairly and impartially, free from collusion, partiality, dishonest, conflicts of interests, and fraud;
>
> (c) the Village of Fox Lake and its citizens, its public officials and its public employees of the right to make a cable television franchise award with full disclosure of ownership interests;
>
> and to obtain the Village of Fox Lake cable television franchise contract by means of false and fraudulent representation and promises, knowing them to be false when made, . . .

The jury was instructed that

> A scheme means some plan or course of action intended to deceive another and to deprive another of something of value by means of false pretenses, representations, or promises.
>
> A scheme to defraud under the mail fraud statute may include a plan to deprive citizens of the honest and impartial functioning of a public office, and this is "something of value" within the meaning of the mail fraud statute.
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> . . . [I]t is not necessary that the government prove all of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme, [but] it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud, . . . [and] you must unanimously agree upon which one or more of them has been proven.
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> * * *
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> The phrase "intent to defraud" means that the acts charged were done knowingly and with the intent to take financial advantage of a confidential relationship, or to deceive Fox Lake and its citizens in order to cause the loss of their right to the loyal, faithful and honest services of Mayor Richard Hamm in the performance of his official duties, or in order to cause the loss of the honest, fair and impartial conduct of business of the office of mayor or village.

The instructions presented the theories outlined in the indictment in the alternative (i.e., using the word "or"); the jury was told that it could convict Lovett as long as it agreed upon any one of them. As in *McNally*,

then, the jury was not required to find that the citizenry was defrauded of any money or property. Thus, the instructions allowed the jury to convict for conduct that is outside the scope of the mail fraud statute, and the conviction must therefore be vacated. *McNally*, 107 S.Ct. at 2882; *see also United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir. 1987); *United States v. Ochs*, (1st Cir.) (slip op. Mar. 15, 1988); *United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987); *United States v. Slay*, (E.D. Mo.) (slip op. Nov. 4, 1987).

Contrary to the government's assertion, this case does not fall within the role of *United States v. Wellman*, 830 F.2d 1453 (7th Cir. 1987), where the Seventh Circuit refused to overturn a mail fraud conviction on *McNally* grounds. In *Wellman*, defendant was charged with using the mail to sell chemical transportation tanks based on misrepresentations that they met government specifications. The scheme was characterized as one to defraud the buyer of "its right to have safe and authorized equipment for the storage and shipment of hazardous chemicals and of its right to know that equipment it purchased was in full compliance with [government] regulations," and to "obtain[ ] money by means of false and fraudulent pretenses, representations and promises." The Seventh Circuit found that the jury could not have convicted for conduct outside the statute's reach, for "the government could not logically prove one scheme without proving the other since the elements of the two were identical." 830 F.2d at 1463.

The government argues that this case is analogous to *Wellman*. Indeed, it goes so far as to argue that

> Like the conduct charged and proved in *Wellman*, "far from involving intangible rights, this case presents a typical garden variety fraud perpetrated against [the victims] in part through use of the United States mail. Such conduct was precisely what Congress intended to proscribe."

Government's Response at 5, quoting *Wellman*, 830 F.2d at 1463.

It seems to us that this argument can only be characterized as disingenuous. Both the district court and the court of appeals explicitly noted that the mail fraud counts were tried to jury on an intangible rights theory – i.e., the theory that the defendant intended to deprive the citizens of Fox Lake of their rights to good government and to the honest services of public officials. *See* Memorandum Opinion and Order of October 28, 1985 at 2; *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987). Indeed, the government argued to the jury that it should convict Lovett even if it believed his testimony that he only offered Mayor Hamm the right to choose the holder of the 5% interest – on the theory that such conduct created a conflict of interest for the mayor and thereby deprived the citizens of Fox Lake of their right to good government, i.e., government free of conflicts of interest. *See* Transcript of August 8, 1985 at 34, 88, 102. This case is thus totally unlike *Wellman*, in which defendant was in essence charged with bilking a buyer of chemical storage tanks out of his money by falsely claiming that the tanks complied with government regulations. The Lovett jury might well have found that Lovett schemed to defraud the citizens of Fox Lake of their right to good government

(e.g., by placing the mayor in a conflict of interest) without finding that he deprived the citizens of any sort of property rights. Thus, Lovett may have been convicted for conduct outside the scope of the mail fraud statute, and his conviction cannot stand.

Conclusion

For the foregoing reasons, Petitioner's motion to vacate his conviction and sentence is granted.

ENTER:

/s/ Paul E. Plunkett
Honorable Paul E. Plunkett
District Court Judge

Dated: May 16, 1988